

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ERIC P. RHODES

Claimant

VS.

SNODGRASS & SONS CONST. CO. INC.

Respondent

AND

**BUILDER'S ASSOC. SELF-INSURERS
FUND OF KANSAS**

Insurance Carrier

Docket No. 1,013,201

ORDER

Respondent and its insurance carrier request review of the December 5, 2003 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

The Administrative Law Judge (ALJ) noted there was conflicting testimony at the preliminary hearing. Claimant testified that he injured his ankle when he fell off a ladder. Claimant's foreman testified that a week later the claimant said that he had faked the accident. Claimant denied saying that. The ALJ concluded claimant suffered a compensable injury based upon the evidence that when claimant's boot was removed his ankle was swollen to such a degree that the ALJ concluded claimant would have had difficulty putting his boot on in order to have faked the accident.

The respondent requests review of whether claimant suffered accidental injury arising out of and in the course of his employment. Respondent argues claimant had previously injured his ankle, concealed that fact when he arrived at work and then had faked the accident. Respondent notes that claimant's foreman was later told by claimant that the accident had been faked. Consequently, respondent requests the Board to reverse the ALJ's Order and deny benefits.

Conversely, the claimant argues that he met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment. Claimant notes that after the accident his co-workers had to climb down the ladder into the hole to assist him. After his boot was removed his ankle was so swollen that claimant was unable to bear weight and had to be assisted up the ladder and to the hospital. Claimant argues the facts demonstrate he did not fake the accident as alleged by his foreman. Consequently, claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant testified that on September 17, 2003, he drove his manual transmission vehicle to work and reported to the office trailer where he signed in and waited for his work assignment. Claimant testified that he spoke with his foreman and then a supervisor named Garth gave him his work assignment to finish some form work. Claimant testified that he got a cordless drill, a roll of plastic and drove his truck to where he was working on the form.

John Trent, claimant's foreman, testified that on September 17, 2003, he was standing outside the office trailer when claimant arrived at work. Mr. Trent testified the claimant never left his pickup and asked if he could proceed to where he was working on the forms. Mr. Trent agreed it was possible that claimant had been to the office trailer before Mr. Trent had arrived but in his opinion claimant had not been to the office trailer because Mr. Trent had watched claimant come through the gate that morning.

Mr. Trent noted that although claimant would usually go into the office trailer to sign in and discuss his job assignment he did not on the morning of the alleged accident. Mr. Trent noted claimant did not sign in for work that morning but he did not have the time sheet to confirm that fact when he testified. Mr. Trent did not see claimant get out of his pickup.

Claimant testified that he had precut plastic into two foot square rolls and began to climb down a 30 foot ladder into the hole where he was constructing forms. About six or seven feet from the bottom claimant slipped and fell injuring his left ankle. Claimant yelled for help. After he was finally heard, several co-workers and claimant's foreman came down the ladder to help claimant. Claimant's boot was removed and his ankle immediately became swollen to approximately the size of a grapefruit. Because claimant could not put much weight on his ankle he was helped up the ladder.

Mr. Trent noted that after he climbed down the hole to help claimant he observed claimant's ankle was swollen at least the size of a grapefruit. And he agreed that because of the condition of claimant's ankle the claimant could not climb the ladder by himself nor

carry any materials and climb the ladder. Mr. Trent took claimant to the hospital emergency room. Claimant was provided pain medication, x-rayed and placed in a temporary cast.

Approximately a week after the accident Mr. Trent had a discussion with claimant regarding some of respondent's missing equipment. Mr. Trent testified that at the conclusion of that conversation the claimant volunteered that he had injured his ankle the night before September 17, 2003, and had faked the accident at work. Claimant denied he had injured his ankle before September 17, 2003, and denied telling anyone that he had.

During the preliminary hearing the claimant requested additional time to obtain and provide the emergency room records. The respondent requested additional time to obtain and provide the respondent's sign-in sheets for the date of the accident. By stipulation of the parties, the emergency room records as well as the respondent's sign-in sheets were admitted into evidence as part of the record.

The emergency room records confirmed claimant had extreme swelling of his left ankle and was unable to bear weight. There was a notation that appears to indicate the ankle was discolored. Claimant provided a history of a work-related fall of approximately 6 feet from a ladder.

Attached to the sign-in sheet was a note to respondent's counsel signed by Steve Slusher which indicated the sign-in sheets are not signed in order and therefore they do not indicate when claimant signed the sheet. The note further contained the opinion that it was believed claimant signed the sheet when he was brought back to the trailer after going to the emergency room. The note concluded that claimant left the project at 12:00. However, on the sign-in sheet in the "Time In" column is written the time 7:00 followed by claimant's signature. In the column where claimant's name is written is the notation 12:00. Next to that is the "Time Out" column where the time 3:30 is written.

The claimant testified that when he arrived at work he went into the office trailer and signed in. He then was told by Garth where he was to work. Although the respondent argues the time sheet supports Mr. Trent's testimony that claimant never went into the office trailer that morning, the Board disagrees. On its face the sign-in sheet supports claimant's contention that he signed in on the morning of September 17, 2003. This corroborates claimant's testimony. And although respondent argues the 12:00 notation indicates when claimant signed in, the note attached to the sign-in sheet indicates that is when claimant left the project. Moreover, the supervisor named Garth did not testify to refute claimant's testimony regarding their conversation in the office trailer the morning of the accident.

As noted by the ALJ, if claimant had injured his ankle the night before then putting his boot on would have been difficult. The claimant testified that he was unable to bear

weight on his ankle after the accident and had to be physically assisted up the ladder. Claimant's supervisor confirmed that the condition of claimant's ankle prevented claimant from climbing the ladder and he would have been unable to carry any of the supplies up the ladder because of the condition of his ankle. That testimony would appear to refute the contention claimant's ankle had been injured before he arrived at work. The condition of claimant's ankle prevented him from climbing up the ladder, conversely it would appear the same could be said regarding claimant's ability to climb down the ladder carrying supplies if his ankle had already been injured.

The Board concludes the claimant, by the barest of margins, has met his burden of proof to establish he suffered a work-related injury to his left ankle on September 17, 2003. Accordingly, the ALJ's Order is affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.¹

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated December 5, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2004.

BOARD MEMBER

c: Paul V. Dugan Jr., Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director

¹ K.S.A. 44-534a(a)(2) (Furse 2000).